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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-299

FONTANA AVIATION, INC., A MICHIGAN CORPORATION,
Petitioner,

vs.

ROBERT BALDINELLI, RUDY LUNDHOLM, AVIS RENT A CAR SYSTEM, A DELAWARE CORPORATION, AND THE HERTZ CORPORATION, A DELAWARE CORPORATION,
Respondents.

BRIEF OF RESPONDENT, THE HERTZ CORPORATION, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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OPINIONS BELOW

The opinion of the Court of Appeals for the Sixth Circuit is reported at 575 F. 2d 1194 (1978). The opinion of the District Court for the Western District of Michigan, Northern Division is reported at 418 F. Supp. 464 (1976). Both opinions are printed in Appendix A to the Petition.

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

QUESTION PRESENTED FOR REVIEW

Whether a private antitrust action, alleging a concerted refusal of respondents to deal with petitioner, accrued when the contractual relationship between the parties was terminated more than four years prior to suit and is barred by the statute of limitations, 15 U. S. C. § 15(b).

STATUTES INVOLVED

The statutory provisions involved are Sections 1 and 2 of the Sherman Act, 15 U. S. C. §§ 1 and 2, and Section 4(B) of the Clayton Act, 15 U. S. C. § 15(b). The foregoing statutes are printed in Appendix B to the Petition.

STATEMENT OF THE CASE

Plaintiff-Petitioner, Fontana Aviation, Inc. ("Fontana"), filed this action on July 2, 1973 against Robert Baldinelli ("Baldinelli"), Rudy Lundholm ("Lundholm"), Avis Rent-A-Car System ("Avis"), and The Hertz Corporation ("Hertz"). Fontana seeks treble damages under 15 U. S. C. § 15 for alleged violations of §§ 1 and 2 of the Sherman Antitrust Act, 15 U. S. C. §§ 1 and 2. The alleged antitrust violation is a "continuing combination and conspiracy to unreasonably restrained trade" by refusing to deal with Fontana and "to monopolize the business of renting automobiles to the public in the Iron Montain and Kingsford, Michigan-Niagara, Wisconsin area." Hertz is alleged to be a proper defendant because it was aware of and acquiesced in the alleged agreement and refusal to deal by Baldinelli and Lundholm, the local Avis and Hertz licensees. (Complaint, App. 3a-5a).[1] Hertz, by its Answer, denies any involvement in or knowledge of the alleged illegal conduct of the local licensees. On defendants' motions for summary judgment, the District Court held that plaintiff's cause was barred by the statute of limitations, 15 U. S. C. § 15(b). This holding was affirmed by the Court of Appeals.

1. References are to Appellees' Supplemental Joint Appendix in the Court of Appeals, part of the record certified to this Court.

Counsel for all parties agree that the basic underlying facts are not in dispute for purposes of the motions for summary judgment. (Petition p. 2).

From 1960 through January, 1975, Fontana operated an airport terminal at Ford Airport near Iron Mountain, Michigan and claimed the exclusive right to all concessions in the terminal's public lobby. (App. 112a). In 1961 Fontana entered into an oral agreement with Baldinelli, the local Avis licensee. In 1960 Fontana and the local Hertz licensee had entered into an identical agreement which continued with Lundholm, who became the Hertz licensee in 1969. (App. 4a). Under these agreements the licensees agreed to pay Fontana a fee equaling 20% of all time and mileage charges on each rental which originated or terminated at Ford Airport. Fontana claims that the 20% fee consisted of 10% as payment for services rendered by Fontana and 10% as a "concession fee" for the privilege of operating in the public lobby. (App. 4a, 57a, 58a, 81a, 101a). There was no discussion of the length of these oral agreements or how either party could terminate the relationship. (App. 63a). From 1961 to 1969 car rental operations at Ford Airport were conducted at a counter provided by Fontana in the terminal building. Fontana employees or officers wrote rental agreements at the counter using the Hertz or Avis forms kept behind the counter and performed other rental services. (App. 56a-58a, 78a, 80a, 81a, 96a).

Fontana alleges that shortly before February of 1969 Baldinelli and Lundholm entered into a conspiracy to commit antitrust violations. (App. 4a). Lundholm agreed to obtain, and then allow Baldinelli to control, the local Hertz agency. Fontana claims that the goal of this conspiracy was accomplished when, "upon establishing monopoly control of the car rental market, Baldinelli terminated his Avis agency agreement with

Fontana and withdrew the Avis rental office from Ford Airport" and when "Baldinelli caused the Hertz agency, or caused Lundholm to terminate its agreement with Fontana and withdrew the Hertz office from the Ford airport." (App. 4a). The only other claim of the effects of the alleged conspiracy is that Baldinelli raised car rental prices. (App. 5a). There is no allegation of damage to Fontana's business by these price increases, nor any allegation or testimony that Fontana rented any cars. The only claimed damage to Fontana is the loss of it 20% fee as a result of the refusal of Baldinelli and Lundholm to deal with Fontana under the oral agreement. (App. 5a).

In February of 1969 defendant Lundholm replaced the previous Hertz licensee. (App. 85a, 101a). It was immediately "common knowledge" that such a change had occurred. (App. 87a-89a). On May 3, 1969 Baldinelli removed the Avis signs, an Avis clock, rental agreement forms, and the Avis credit card machine from the counter at Ford Airport. At the same time, Lundholm terminated his agreement with Fontana and the Hertz advertising, rental forms and machine were also removed. At the time of removal Baldinelli informed Fontana that he was taking those things out and that he would no longer use Fontana personnel. (App. 51a, 66a, 70a, 79a, 5a). Fontana was immediately aware of this "pull-out" and the empty counter. (App. 21a). Fontana has admitted that by these acts, Baldinelli and Lundholm "withdrew simultaneously from the airport terminal facilities and stopped paying rental or concession fees to Fontana Aviation" and that Fontana was aware of this as of May 3, 1969. (App. 20a, 68a).

Immediately after the removal of the Hertz and Avis equipment from the counter, officers of Fontana saw both Avis and Hertz rental agreements being written in the airport terminal lobby, rather than at the Fontana counter. (App. 70a-72a, 91a, 97a). Shortly before these events, in a letter dated April 30, 1969, Lundholm told Fontana that no further Hertz reservations could be taken by Fontana at the airport. (App. 53a,

122a). On May 13, 1969, Baldinelli announced in a public newspaper advertisement that Avis had "decided to terminate its operations from the Ford Airport terminal building with Fontana Aviation, Inc." (App. 52a, 54a, 73a). A similar advertisement was run on May 22, 1969.

The officers of Fontana stated that they were aware in early May of 1969 that the conspiracy to refuse to deal with Fontana existed, that Baldinelli and Lundholm had "pulled out in concert," (App. 106a, 102a-103a), were "in cahoots", and that Hertz and Avis were also "in it up to their ears" and were "sleeping with the local licensees." (App. 104a, 107a, 98a, 94a, 95a). Fontana also knew in May of 1969 that Baldinelli had used Lundholm as a "front" in order to "start this conspiracy." (App. 68a).

Fontana also claims that it was injured on May 3, 1969. (App. 93a-94a, 97a). Plaintiff's attorney stipulated that no payments were made to Fontana "after April 30th in the case of Lundholm for Hertz, and after May 5, in the case of Baldinelli for Avis," and that "we have been damaged from May 1 on." (App. 70a-71a). A letter of July 24, 1969, from Baldinelli to Fontana confirmed that their relationship had been terminated on May 5, 1969. (App. 51a, 120a).

On January 25, 1971, a state court action was filed by Fontana against Baldinelli, for breach of contract and damages consisting of 10% of all rental agreement charges received by Baldinelli since May 3, 1969. (App. 138a). That suit is still pending. The President of Fontana testified that, although Fontana knew there was a conspiracy to refuse to deal and that Hertz and Avis were "into it up to their ears" (App. 104a), Fontana did not then proceed against Hertz and Avis "because our antitrust attorney, Mr. McConnell (Fontana's counsel here, who is also Chairman of the Board of Directors of Fontana), was busy with other things and we felt that initially that, but for all the things were going on, the various aspects of the conspiracy, that the very least there was a contract violation and that we should get the ball rolling on that . . ." (App. 104a).

Fontana has stated that after January, 1975 it no longer owned and operated the Ford Airport terminal building. (Petition p. 2). In 1977 a second suit was filed in the Federal District Court upon the same claim for damages for the period from the filing of the instant suit, in July, 1973, through December 31, 1974. The second suit is still pending.

The District Court held that under these facts this cause was barred since the statute of limitations began to run when "the 'blow was struck' when the relationship between the parties was actually terminated, that is, at the time of the 'pull-out' during May," and "that later incidents are but its consequences." The Court of Appeals affirmed this decision and reiterated that "the record does not support Fontana's theory of a continuing conspiracy." Neither Court held, as petitioner has characterized, that the statute of limitations ran from the "announcement" or "false announcement" of a conspiracy.

I. Both Courts Below Correctly Applied This Court's Decision in Zenith v. Hazeltine in Holding Petitioner's Cause Barred by the Statute of Limitations

The decision below fully comports with the basic rule regarding the accrual of causes under the antitrust statute of limitations. That rule was reiterated by this Court in *Zenith Radio Corp.* v. *Hazeltine Research, Inc.*, 401 U. S. 321 (1971), *reh. den.* 401 U. S. 1015 (1971) as follows:

> The basic rule is that damages are recoverable under the federal antitrust acts only if suit therefor is 'commenced within four years after the cause of action accrued.' 15 U. S. C. § 15(b), plus any additional number of years during which the statute of limitations was tolled. Generally, a cause of action accrues and the statute begins to run when a defendant commits an act that injures a plaintiff's business. (*Id.* at 338).

If there is more than one such overt act, the rule is that the statute runs from "the commission of the last overt act causing

injury or damage." *Akron Presform Mold Co.* v. *McNeil Corp.*, 496 F. 2d 230, 233 (6th Cir. 1974), *cert. den.* 419 U. S. 997 (1974).

Contrary to the statement of Petitioner, the holding below was not that this cause accrued upon a "mere announcement" of a conspiracy, but that the events of May, 1969 constituted the last injurious overt act. The Courts found from the record that any cause for the loss of contract service and concession fees, as claimed by Petitioner, accrued as of the actual termination of the contract and payments in May. The Court found the most apt analogy in dealer termination and refusal to deal cases. *Emich Motors Corp.* v. *General Motors Corp.*, 229 F. 2d 714 (7th Cir. 1956); *Garelick* v. *Goerlich's, Inc.*, 323 F. 2d 854 (6th Cir. 1963); *Sherman* v. *Goerlich's, Inc.*, 238 F. Supp. 728 (E. D. Mich. 1963), 341 F. 2d 988 (6th Cir. 1965), *cert. den.* 382 U. S. 830 (1965).

There is no merit in Petitioner's claim that the holding below conflicts with *Zenith* v. *Hazeltine* because of the "continuing conspiracy" aspects of *Zenith*. There is no "continuing conspiracy" exception to the statute of limitations in *Zenith*. Even in such a case, this Court indicated that the statute commences to run with the defendant's commission of an illegal overt act and will only run anew after a later, independent overt act causing separate damages. In *Zenith*, this Court said as follows:

> In the context of a continuing conspiracy to violate the antitrust laws, such as the conspiracy in the instant case, this has usually been understood to mean that each time a plaintiff is injured by an act of the defendants a cause of action accrues to him to recover the damages caused by that act and that, as to those damages, the statute of limitations runs from the commission of the act . . . However, each separate cause of action that so accrues entitles a plaintiff to recover not only those damages which he has suffered at the date of accrual, but also those which he will suffer in the future from the particular invasion including

> what he has suffered during and will predictably suffer after trial. (*Id.* at 338-339).

The statute of limitations runs only from the commission of the latest overt illegal act causing damage, even if there is a later non-damaging act or a "continuing conspiracy." In the case at bar, Petitioner Fontana is claiming antitrust injuries only from Respondents' refusal to deal with it. Thus, only one alleged illegal overt act, the refusal or termination, caused damage, as the Courts held below.

Petitioner is arguing that continued damages can extend the limitations period, an argument that is unsupported by *Zenith*. In *Southeastern Hose, Inc.* v. *Imperial-Eastman Corp., et. al.*, 1973 Trade Cases ¶ 74, 497 (N. D. Ga. 1973), the court rejected a plaintiff's argument that *Zenith* stood for this proposition, saying:

> It should be noted, however, that *Zenith* does not stand for the proposition that a separate cause of action arises whenever plaintiff feels the impact of damages from the violative act. If such future damages were foreseeable at the time of the act, and could have been recovered in a law suit commenced at that time (or within four years thereafter), then *Zenith* implies that no new cause of action accrues. To interpret the Court's opinion otherwise would vitiate the effectiveness of the statute of limitations as a statute of peace. (*Id.* at 94, 129).

Arguments based upon a "continuing conspiracy" are also irrelevant since both Courts below expressly found no support in the record for the existence of a continuing conspiracy here. In such a case this Court has stated the following rule:

> A seasoned and wise rule of this Court makes concurrent findings of two Courts below final here in the absence of very exceptional showing of error. *Comstock* v. *Group of Institutional Investors*, 335 U. S. 211, 214 (1947).

No such showing is made here, and the finding on this issue should be final.

The only exception to the statute of limitations propounded by *Zenith* v. *Hazeltine* is the "speculative damage" exception, which Petitioner asserted below, but has apparently now abandoned. In any event it is inapplicable here. This exception states that a plaintiff may recover damages occurring after the statute of limitations has run if damages were "speculative, uncertain or otherwise incapable of proof during the period of the running of the statute of limitations." *Akron Presform Mold Co., supra* at 233. *In Akron,* the Court held that a plaintiff has a burden of proving the applicability of this exception to the general rule that the statute commences to run from the last overt act causing injury. *Id.*

This Court has made clear that the *Zenith* exception does not apply where damage measures are available, as in the instant case. In its earlier decision in *Zenith Corporation* v. *Hazeltine Research, Inc.*, 395 U. S. 100 (1968), the plaintiff appealed *inter alia* on the basis that Zenith had not established the fact of damage. The Court pointed out that it was sufficient to show that "some damage" flowed from the illegal act, and thereafter that a plaintiff need not show with particularity the extent or scope of damage in order to get to the jury. (*Id.* at 114). In accord, see *Wilmar Poultry Co.* v. *Morton Norwich Products, Inc.*, 1974-2 Trade Cases ¶ 75,292 (D. Minn. 1974), 520 F. 2d 289 (8th Cir. 1975), *cert. den.* 424 U. S. 915 (1976); *Monona Shores, Inc.* v. *U. S. Steel Corp.*, 374 F. Supp. 930, 936-939 (D. Minn. 1973).

Here, Fontana had the measuring rod of a nine year history of dealing with Hertz and Avis local licensees, including their audits and a record of each rental contract written. (App. 64a, 83a). Such prior business history may be used to project estimates of future lost profits. *Volasco Products Co.* v. *Lloyd A. Fry Roofing Co.*, 346 F. 2d 661, 664 (6th Cir. 1965). In addition, profits in comparable businesses may be used. *North Texas Producers* v. *Young*, 308 F. 2d 235 (5th Cir. 1962). Furthermore, damages accruing after the filing of suit may be

used to determine future damages. *Flintkote Co.* v. *Lysfjord,* 246 F. 2d 368, 394 (9th Cir. 1957), *cert. den.* 355 U. S. 835 (1957).

In similar refusal to deal cases involving gasoline and auto franchises, once the initial termination and "some damage" therefrom were established, juries have been allowed to consider how far into the future the litigants would have dealt but for the termination and for how long damages would continue to flow. See *Simpson* v. *Union Oil Corp.*, 411 F. 2d 897, 909 (9th Cir. 1969), *rev'd on other grounds* 396 U. S. 13 (1969); *Lehrman* v. *Gulf Oil Corp.*, 464 F. 2d 26, 46 (5th Cir. 1972), 500 F. 2d 659, 1077 (1974), *cert. den.* 409 U. S. 1077 (1972).

Further, the second *Zenith* decision left great discretion to the District Court to determine the sufficiency of damages. *Zenith* v. *Hazeltine, supra* at 340. Here the District Court found they were not speculative.

II. The Decision of the Courts Below Does Not Conflict with Holdings in Other Circuits

The decision below is consistent with decisions in other circuits. Each case cited by Petitioner to show an alleged conflict contains no contrary holdings and is factually distinguishable.

In *Poster Exchange, Inc.* v. *National Screen Service Corp.*, 517 F. 2d 117 (5th Cir. 1975), the Fifth Circuit reiterated the general rule that to avoid the bar of the statute of limitations there must be an injurious illegal overt act *within* the limitations period and not merely an absence of dealing, stating as follows:

> It remains clear nonetheless that a newly accruing claim for damages must be based on some injurious act actually occurring during the limitations period, not merely the abatable but unabated inertial consequences of some pre-limitations action. (*Id.* at 128)

There plaintiff alleged a conspiracy to monopolize and exclude it from the motion picture accessory industry. The Court did

not preclude a statute of limitations defense, but remanded for a determination of whether there was such an injurious act within the four years prior to suit. Upon remanding the Court's direction was as follows:

> We think it critical that the Court determine whether there was, during the period sued upon, a mere absence of dealing, or whether there was some specific act or word precluding Poster from obtaining supplies from National Screen. (*Id.* at 128)

In the instant case there was but an "absence of dealing" during the period sued upon, and no allegation of a later act precluding dealing.

The Court in *Poster Exchange* also indicated that there are some fact situations where there is only one damage causing act, where the violative act is "final at its impact". *Id.* at 126. The Court cited as examples of such situations, dealership terminations, and footnote 18 of its decision refers in this regard to *Emich Motors Corp.* v. *General Motors Corp., supra,* a case relied upon by Respondent and the District Court below. The initial refusal to deal was not necessarily "final at its impact" in *Poster Exchange,* since there was no contract or franchise agreement between the parties which could be terminated. In tne instant case, however, there was an "agreement" between the plaintiff and each of the individual defendants, which was "terminated" in May, 1969. (App. 4a). The termination of that contractual agreement is analogous to a dealer termination. It was, in the language of *Poster Exchange,* "by its nature permanent at initiation without further acts" *Id.* at 126. Thus the holding below, that the May, 1969 termination was the act from which the state of limitations ran, fully accords with *Poster Exchange.*

Likewise there is no conflict between the decision below and the Ninth Circuit, Fifth Circuit and Third Circuit cases cited by Petitioner: *Twin City Sportservice, Inc.* v. *Charles O. Finley & Company,* 512 F. 2d 1264 (9th Cir. 1975); *Imperial Point*

Colonnades Condominium, Inc. v. *Mangurian*, 549 F. 2d 1029 (5th Cir. 1977); *Hanover Shoe, Inc.* v. *United Shoe Machinery Corp.*, 377 F. 2d 776 (3rd Cir. 1967), *aff'd in part*, 392 U. S. 481 (1968).

These cases are factually inapposite. Each of these cases involved an antitrust claim based upon an alleged illegal contract entered into before the statute of limitations period and continuing in force during the limitations period. In *Twin City Sportservice*, during the limitations period defendant sought to enforce and collect benefits under a contract with a baseball club owner under which defendant claimed the exclusive right to operate baseball park concessions. In the *Mangurian* case a condominium developer collected rents during the limitations period under an allegedly illegal recreational facility lease. In the *Hanover* case a shoe machinery manufacturer collected benefits during the limitations period under machinery leases. In each case the Court allowed an antitrust claim challenging the contract to be asserted despite the statute of limitations. Each of these is far different from, if not opposite, to the facts here, where a contract was *terminated before* the limitations period.

Despite the factual dissimilarity, the theory of the foregoing cases is the same basic theory applied below in this case: that there must be an injurious overt act in the limitations period. Unlike this case, in those cases such an act was found within the limitations period, in the enforcement of a contract or the collection of benefits under it. *Imperial Point Colonnades Condominium, Inc.* v. *Mangurian, supra* at 1036.[1]

III. No Important Private Antitrust Action Policy Issue Is Involved Here

Petitioner finally suggests that this case is important to the viability of private actions to enforce the antitrust laws. Based upon the facts of this case such a claim cannot be supported.

1. The recent Fifth Circuit decision in City of *El Paso* v. *Darbyshire Steel Co.*, 1978-1 Trade Cases ¶ 74,808 (5th Cir. 1978) suggests that the rationale of the *Mangurian* case may in the future be limited to situations where damages are "speculative" under *Zenith*.

The injury for which Petitioner claims damages, the loss of commission income from a refusal to deal, is purely personal. It is more in the nature of a contract claim than an antitrust claim. Indeed, as noted above, it is the subject of a pending contract action. Such claims not brought as a member of the injured public are extraneous to the policy of the antitrust laws, which are for "the protection of competition, not competitors," *Brown Shoe Co.* v. *United States*, 370 U. S. 294, 320 (1961); *Brunswick Corp.* v. *Pueblo Bowl-O-Mat, Inc.*, 429 U. S. 477 (1977). Not only is no significant public interest involved here, but dismissal of this antitrust action still leaves petitioner the remedy of its pending contract action.

Further, Petitioner's delay in bringing suit, and awaiting the accumulation of damages, when it knew immediately of the alleged essential antitrust elements, does not serve any public interest. Rather, Petitioner's delay justifies the application of the statute of limitations. The purpose of the statute is "not only to bring about a condition of repose but also to enable a potential defendant to have timely notice of any alleged dereliction." *Isthmian Lines, Inc.* v. *Rosling*, 360 F. 2d 926, 927 (2nd Cir. 1966). Statutes of limitations are also intended "to force suits to be brought without unreasonable delay so that neither party will be advantaged or disadvantaged by the passage of time." *Vason* v. *Nickey*, 438 F. 2d 242, 244 (6th Cir. 1971). As stated by this Court in *Telegraphers* v. *Railway Express Agency*, 321 U. S. 342, 348 (1944):

> Statutes of limitations . . . are designed to promote justice by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared. The theory is that even if one has a just claim it is unjust not to put the adversary on notice to defend within the period of limitation and that the right to be free of stale claims in time comes to prevail over the right to prosecute them.

The Court in *Dayco Corp.* v. *Goodyear Tire & Rubber Co.*, 523 F. 2d 389, 394 (6th Cir. 1975), citing *Wood* v. *Carpenter*, 101 U. S. 135 (1879), also stressed that: "statutes of limitation are vital to the welfare of society and are favored in law."

Furthermore if, as Petitioner argues, a new cause of action accrues each day a rental agreement is written after the termination, then the statute of limitations will never run. According to this logic if a plaintiff intentionally sits and waits while a defendant commits a wrongful act and thereafter damages flow for 50 years, it could then still sue for the last four years worth of damages. As the Court in *Southeastern Hose, supra,* noted, such a "construction" makes a mockery of the language of any statute of limitations that sets forth a fixed time period. Moreover, if accepted in this setting such an argument would vitiate the statute of limitations in similar contractual termination cases.

Finally, this case turns on peculiar facts, not likely to recur. It is episodic and the decision will affect virtually no one other than Petitioner and Respondents, since Petitioner ceased doing business at the airport in January, 1975.

CONCLUSION

For all the foregoing reasons Respondent, The Hertz Corporation, respectfully requests that the Petition be denied.

Respectfully submitted,

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